No. 12194

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MABEL E. WEST,

Appellant,

vs.

W. E. CONRAD and HOWARD F. CONRAD,

Appellees.

APPELLANT'S REPLY BRIEF.

GEORGE W. MANIERRE,
PAUL G. BRECKENRIDGE,
814 Merritt Building, Los Angeles 14,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles, Phone MA. 6-9171.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

No. 12194

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MABEL E. WEST,

Appellant,

vs.

W. E. CONRAD and HOWARD F. CONRAD,

Appellees.

APPELLANT'S REPLY BRIEF.

To the Honorable, the Chief Judge and the Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant Mabel E. West respectfully submits to the Court this, her reply brief.

I.

Reply to Appellees' Statement of the Case.

Appellees, under the heading of "Statement of the Case" present three points, therein termed "Comments."

The first two are so nebulous as not to require answer.

The third so-termed "Comment" is obviously highly improper and can only be considered as an undisguised attempt to interject in this appeal matters not a part of the trial below, and entirely outside the record.

Appellant would prefer to ignore such improper reference, but in fairness to herself, believes it incumbent to reply thereto.

The judgment referred to is not a final judgment. It was rendered in the Superior Court of Los Angeles County in an unlawful detainer action (a "special proceeding" under the California law with limited issues and defenses), filed on June 18, 1948, more than a month after this action had been filed in the Federal Court and after this action was at issue. The said Superior Court determined it had jurisdiction to proceed, and, even though at the time this case had already been set for trial in the Federal Court, refused to defer to the Federal Court, a court of competent and concurrent jurisdiction which had already assumed jurisdiction, and proceeded to set the unlawful detainer action for trial on August 31, 1948, and to try same on said date.

After trial, and on or about the 2nd day of September, 1948, the Superior Court Judge took the case under submission, in which status it remained until November 3, 1948. While the case was still under submission and not decided, the within case came on for trial and was decided by Judge Yankwich, and counsel for appellees herein wrote two letters, dated respectively October 23, 1948, and November 2, 1948, to the Judge who had the Superior Court case under submission. Copies of said letters are contained in the appendix hereto and speak for themselves. On November 3, 1948, the said Judge rendered his memorandum decision.

Regardless of the propriety or impropriety of said letters, they were written with the expressed purpose to influence the decision in the said Superior Court case then under submission.

Inasmuch as the legal consideration of a Federal Statute (Federal Rent Control case) was involved, it would probably not be presumptious to assume under the circumstances that the decision in the Superior Court took into consideration (and not improperly) the statements that Judge Yankwich in the instant case had found for the defendants (appellees herein), even though the decision of Judge Yankwich was not a final judgment.

II.

Reply to Appellees' Statement of Questions Involved.

It is apparent that appellees have attempted to avoid rather than answer or meet the question raised by appellant and involved in this appeal. Appellees might just as well have gone one step farther and said the only issue was "Should the plaintiff prevail or should the defendants prevail?"

Appellees would completely ignore the question as to the fact of and effect of the registration of the premises under the act, the "ceiling rent" determined therefor, the express language of the lease, the spirit and purpose of the applicable Rental Control Acts, the steps and procedure, if any, required to remove or change the premises from the registered classification and "ceiling," the legal distinction, if any, between a business of providing housing accommodations and one providing commercial, industrial or non-housing accommodations. It is the opinion of appellant that all the points and questions raised by her in her brief are pertinent, relevant and essential, and appellant further submits that they are in conformance with, and follow, the points on which she stated she intended to rely on her appeal. [R. 114-117.]

III.

Reply to Appellees' Reply to Alleged Errors.

Appellees apparently have not understood the appellant's objection in respect to certain alleged incompetent evidence. Appellant's contention is that the written lease clearly and unambiguously provides for the use of the premises for any lawful purpose [R. 16] and appellees, in their answer [Para. III, R. 11; Para. III, R. 14; Para. II, R. 15], in the presentation of their case during the trial, and now in their brief, are attempting and have always attempted to contradict the lease in this respect and to attempt to show that it was a lease for particular purposes only.

Appellees apparently are also confused as to appellant's objections to certain evidence. In this connection, appellant's contention is not that the Court was precluded from taking evidence, but that the Court was precluded from taking certain incompetent evidence, as pointed out in appellant's opening brief.

Appellant does not understand the reference to unlawful use contained on page 6 of appellees' brief. The only reason for appellant's placing any emphasis on the term "any lawful purpose" is to show that the lease was not restricted to any particular purpose.

IV.

Reply to Appellees' "Application of Facts to Law."

Appellees apparently are in the position of not being able to see the forest for the trees. They have grasped at certain immaterial, entirely irrelevant and disassociated items or straws, and attempted to construct their defense thereon. They have pounced upon such items as the fact that appellant was engaged in a divorce action; the fact that she had, for a number of years, operated a sanitarium at a different address, and similar irrelevant and immaterial matters. For example, on page 8 of their brief, counsel states as follows:

> "She discussed the sale of the said sanitarium with the appellee, W. E. Conrad, or the taking of a loan thereupon for the purpose of purchasing her husband's interest therein. R. 62-3."

The record discloses [R. 63] that this conversation took place around Christmas in December of 1947, approximately eight or nine months after the lease and occupancy by appellant.

On page 9 of appellees' brief, appellees state that Dr. Westcott "Continued to treat her at the subject premises." (Referring to Mrs. Dempster.)

Dr. Westcott's testimony was innocuous enough of itself, and evidence tending to impeach him is contained in the record [R. 112-113 and R. 71], but even he did not testify as stated in appellees' brief.

Dr. Westcott testified that he saw her in June of 1947 and that was the first time that he went there. He testified that the next time he saw her was about October [R. 78] and that those were all the calls that he had made to see any patient except Mrs. West and Mrs. Drake. In this connection it should be noted that Mrs. West (appellant) testified that Mrs. Dempster left the premises on the first day of June and never returned. [R. 106-107.]

Appellees claim that the record does not support appellant's contention that the evidence and admissions show that the premises were, and were used as and for, housing accommodations. The entire evidence is to the effect, and appellees cannot seriously contend otherwise, that Mrs. Drake intended to, and did reside in the premises, that the appellant did likewise, that each and all of the other parties who testified for appellant or concerning whom testimony was given, were housed and furnished with housing accommodations in the premises, that some, if not all, were furnished with meals, or at least a portion of their meals. Appellees apparently overlooked the fact that the word "guest" suggests the furnishing of housing and substance, as does that provision of the lease which reads as follows: "Lessee to take care of garbage, tin cans and burning of papers, etc." [R. 17.]

The trial judge in his Findings of Fact, refers to the premises as "said dwelling house." [R. 42.] Finally and possibly most significant, is the fact that the trial judge in his Findings of Fact and Conclusions of Law

[R. 41-44] makes no finding that the premises were used for business purposes nor that the premises were not used as housing and dwelling accommodations. The trial judge limits and confines his "Findings" and "Conclusions" (upon which rests the judgment herein appealed from) to what he finds to be "the mutual intention and contemplation of the parties" at the time of the making of said lease [see Finding of Fact VI, R. 43] and to what he concludes "was" and "was not" within the contemplation of the parties [see Conclusions of Law II, R. 44].

A reading of the cases cited by appellees,

Creedon v. Cohen, 73 Fed. Supp. 831;
Wood v. Whitehouse, 83 Fed. Supp. 268;
Paxson v. Smock, 73 Fed. Supp. 793,

discloses situations factually far different and distinguishable from that in this case. In the cases cited, the respective premises were rented and used for such purely commercial or non-residential purposes as conducting a barber shop; conducting a retail furniture business; conducting an automobile parking lot, and conducting a public religious meeting place.

Conclusion.

Appellant respectfully suggests that this case depicts a situation wherein a landlord conceives a plan whereby he believes he can get more rent than is permitted under the Rental Control Acts. He gets rid of the tenant then in possession by giving notice to terminate tenancy and then attempts to rent the premises for approximately five

times the amount of the registered rental ceiling. After some period of vacancy, he leases the premises to appellant for $350 per month instead of the $75 provided in the Registration Certificate. Upon discovery of the overcharge, this action is instituted under the provisions of the Rental Control Acts.

Having been caught in the toils of his own machinations, he now attempts to cast the blame upon appellant, not hesitating under oath to accuse her of "unlawfully, maliciously, knowingly and fraudulently" making certain representations to him "with the deliberate and conceived intent that she would be enabled thereby at a later date to bring before this Honorable Court the present proceedings and thereby unjustly, illegally and unlawfully procure a judgment herein for damages. . . ." [R. 14-15.] Is there one iota of evidence in the record, to excuse, let alone justify such scurrilous allegations?

In view of the record, the facts, and the law, appellant respectfully submits said judgment should be reversed.

Respectfully submitted,

George W. Manierre,
Paul G. Breckenridge,
Attorneys for Appellant.

APPENDIX.

Oct. 23, 1948.

AIR MAIL
Hon. C. A. Paulsen,
Chambers Superior Court,
Trinity County,
Weaverville, California.

Re: Conrad vs. West.

Dear Judge Paulsen:

A few days ago I believe my associate, Mr. Leonard Wilson, advised you by telegram that in the case of West vs. Conrad tried in the Federal Court in Los Angeles, wherein there was involved the question of an alleged violation by Mr. Conrad of the rent control act, a decision was handed down by Judge Leon R. Yankwich, rendering judgment for the defendant, Mr. Conrad, against the plaintiff.

The findings, not yet prepared, will be to the effect generally, that Mr. Conrad did not violate the terms of the rent control act in leasing the subject premises to Mrs. West at the rental of $350.00 per month, but that rather, he having leased said premises for business purposes, the same was not within the scope of the controls set forth in said rent control act.

This is further to advise you that on motion, it was further decided by said Federal Judge that the case pending in the Superior Court presently in your hands, and the case in the Federal Court, were of different nature; that one was not res adjudicata insofar as the other was concerned and that the jurisdiction was not concurrent there being in fact different relief asked for in each of the cases and the parties being different in both of the

cases; that is to say, the parties in the Federal case were plaintiff, Mabel E. West and the defendants, W. E. Conrad and Howard Conrad, while in the Superior Court case the parties were W. E. Conrad, plaintiff and Mabel E. West, defendant.

It appears to us that this decision of the Federal Court is of important significance in your deliberation and we felt you should have this information before you as soon as possible. You will, however, please forgive our delay in getting it to you as we have both been engaged in trial the past few days and this has really been the first opportunity that either of us has had to write in detail.

Yours very truly,

LEONARD WILSON & ARNOLD L. LEADER

By

AL:ls

Leonard Wilson
Lawyer
1103 Quinby Building
650 South Grand Avenue
Los Angeles 14
Vandike 9138

November 2nd, 1948.

Honorable Charles A. Paulsen
Weaverville, California

In re: W. E. Conrad v. Mabel West
(Unlawful detainer)

Dear Judge:

You will find enclosed copy of findings of fact and conclusions of law and judgment in the case of Mabel E. West vs. W. E. Conrad, which were signed by Judge Yankwich of the United States District Court on November 1st.

Mr. Leader and I are of the opinion that it is proper to send you these findings for the reason that the court settles practically all of the objections to your jurisdiction raised in this case by defendants.

We were advised that you would be assigned to Los Angeles on the 1st day of November, but in calling the presiding judge's office yesterday we learned that your transfer was not to be effected.

We feel that inasmuch as the Federal court has decided that Mr. Conrad did not violate the Federal OPA act, this leaves only a question of fact before your honor in this case, that is to say, the failure of the defendant to pay the rent as provided in the lease agreement. We contend that by reason of the failure to pay this rent a judgment for the plaintiff in this action should follow.

Respectfully yours,

Leonard Wilson

LW:LK

c.c. to Messrs. George W. Manierre
and Paul G. Breckenridge.